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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>ROBERT S. GRAHAM,<br><br>Defendant and Appellant. | B218439<br><br>(Los Angeles County<br>Super. Ct. No. YA072476) |

APPEAL from a judgment of the Superior Court of Los Angeles County, James R. Brandlin, Judge. Affirmed.

Pamela J. Voich, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, James William Bilderback II and Tita Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted appellant Robert S. Graham of first degree burglary (Pen. Code, § 459), finding that another person, other than an accomplice, was present in the residence (Pen. Code, § 667.5, subd. (c)), and of unlawful driving or taking of a vehicle (Veh. Code, § 10851, subd. (a)).[1] He was sentenced to a total term of four years in state prison. On appeal, he contends that the trial court erred in failing to instruct the jury on the claim-of-right defense. We affirm.

## BACKGROUND

### I. Prosecution Evidence

On July 24, 2008, Terra Russo was asleep in the bedroom of her two-bedroom apartment on Gardner Street in Los Angeles, which is an upstairs apartment with a balcony facing the street. Around 3:30 a.m., she heard a noise outside her bedroom door. A man, subsequently identified as appellant, walked into her bedroom, but Russo pretended to be asleep. Appellant looked around the bedroom and put his hand toward the light switch, but then put his hand down again without turning on the light. Russo was able to see appellant because the light from a building next door shone through her window.

Russo had never seen appellant before and did not know who he was. Appellant walked around the foot of Russo's bed and looked around the bedroom, walking about seven to eight feet into the room. Appellant looked at Russo, who pretended to be asleep. Russo then saw appellant leave her bedroom, go into the hallway and look into the bathroom, then walk through the living room. Russo heard the front door close, so she got out of bed and went to check on her roommate, who was asleep in the other bedroom. When appellant left, Russo heard keys rattle.

Russo ran down the stairs and saw appellant get into her car, a 1995 Mercedes that was parked across the street from her apartment. Russo yelled at appellant, but appellant

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[1] The jury acquitted appellant of attempted burglary.

drove away in her car. Russo's roommate called the police.

The screen for the front window in Russo's apartment had been removed and placed on a table in the living room. Nothing else had been disturbed or taken from Russo's apartment. Russo's keys had been in or under her purse on the living room sofa, and nothing else had been taken from her purse.

Later that morning, around 8:00 a.m. on July 24, 2008, Richard Tomsic was in his townhome on South Redondo Street in Redondo Beach, when he heard someone jiggling the lock on his front door. It sounded to Tomsic as if someone was trying to break into the house, so he opened the door. He saw keys in the lock and appellant holding the keys. Tomsic asked appellant what he was doing, and appellant replied that he had been directed to go there to do some kind of job by a woman whose name was unfamiliar to Tomsic. Appellant seemed to claim that he was supposed to do some handyman work, but Tomsic noted that he did not have any tools with him and was not wearing any type of uniform.

There were several keys on the key fob, and one key was still in the keyhole, so Tomsic tried the keys to see if they opened his door, but they did not. Tomsic told appellant the keys did not work in his lock, but appellant had no response. Tomsic gave the keys back to appellant and closed the door, and appellant walked away. Tomsic went to call 911 and watched appellant through the window as he walked down the driveway.

Later the same day, around 6:00 p.m., Tomsic was driving his car out of his driveway when he saw appellant sitting in a grey Mercedes, trying to start it. The car alarm had been ringing for 15 to 20 minutes and continued to ring as appellant sat in the car. Tomsic told appellant that he was calling the police, but appellant turned away from Tomsic and said, "Whatever." Appellant remained in the car and did not try to leave. Tomsic called 911 and pointed out the car and appellant to the police when they arrived. The police arrived within one minute and spoke with appellant.

Tomsic testified that, in both interactions with appellant, appellant's demeanor was normal and that appellant did not exhibit any bizarre behavior; nor did he appear to

be under the influence of alcohol or drugs. Appellant appeared to be coherent when Tomsic told him he was calling the police.

**II. Defense Evidence**

Defense counsel called Dr. Ronald Markman to testify at trial.[2] Dr. Markman had spent about one and a half hours on March 30, 2009, evaluating appellant. Dr. Markman testified that he believed that appellant suffered from a paranoid or delusional disorder, as well as a thought disorder. Dr. Markman believed that appellant's paranoid disorder caused appellant to act impulsively and use bad judgment because his perceptions of events might not have been based in reality. Appellant told Dr. Markman that he had been hospitalized in a mental institution in 1997 and had received psychotropic medication to treat anxiety. Appellant subsequently was placed in a residential treatment facility and was on medication, which he did not always take.

Appellant testified that he had been diagnosed with schizoaffective disorder and that he had been given medication and hospitalized for his mental illness. The reason he entered Russo's apartment was that he formerly had dated Russo, Russo had borrowed his car, and he wanted to get his car back. The car had been given to him "by Prime Minister Tony Blair, in Britain." When asked if he had ever lived at the apartment where Russo lived, appellant replied, "[a]ctually, I died at that location. With her being responsible for my death, if you can believe that."

The prosecutor asked appellant if he came back to get his car back, and appellant replied, "Yes. Because she has a habit of trying to take my car. And not bring it back." When asked why he did not ring the doorbell, appellant replied, "I was asked not to." Appellant explained that he did not make his presence known once he was inside the apartment because "it was late. And people were asleep." He did not turn on any lights

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[2] Dr. Markman was one of three psychiatrists appointed by the trial court in connection with pretrial proceedings regarding appellant's competence to stand trial pursuant to Penal Code section 1368.

"[b]ecause I was asked not to wake the tenants." He found Russo's car keys because "an unseen voice" "was leading me through the process of getting the car, because I was there to pick it up. And they told me where the keys were. [¶] They told me to look in the bedroom to see if – to make sure the – tenants were sleeping. And to grab the keys when they figured out where they were. [¶] Because I – they said they were going to be looking through probably the bathroom window, or trying to figure out where they were." When he was asked if he knew the tenants of the building, he said, "Yes. Although I do not know them very well."

Appellant explained his reason for going to Tomsic's home as follows: "I was asked to – knock on his door to see if – the lady was home. When she called. Because she – on the phone asked me – to – see if I could – get him to find her. Because she may not be – in the immediate area." Appellant further stated that he had received the keys that he was using in 1976 "[w]hen they – they granted me access to the – to the – to the facilities." He explained that he was looking for "a fresh change of clothing. Because I'd been very sidetracked in – trying to accomplish my purposes in the visit."

**III. Argument**

During closing argument, defense counsel argued that appellant's mental illness could affect whether appellant had the requisite intent to commit burglary. Defense counsel also argued that appellant's testimony that he was taking his own car back when he took Russo's car indicated that he lacked the requisite intent to steal. Defense counsel also argued that appellant's bizarre behavior in attempting to use Russo's keys to enter Tomsic's townhome and in trying to start Russo's car for 20 minutes while the car alarm was ringing indicated that appellant suffered from mental illness and believed that the car belonged to him and so did not have the requisite intent to commit the crimes with which he was charged.

In rebuttal, the prosecution argued, in part, as follows: "Even though he may have thought of it as his car. Even [though] he may have thought it was claim-of-right. There's no instructions that were given by the court that says if a person has a mental

illness, and if they believe they have a claim-of-right to that property, then that person is not guilty of the offense. [¶] That's not the law as it applies here. Mental illness, a person who suffers from mental illness, the law applies to everybody, . . . . The law only says – as to burglary, if you enter into a house, and when you enter you have the intent to commit a theft. Just as it happened here."

**IV. Jury Question**

During deliberations, the jury asked the court two questions, including the following: "If I unlawfully enter a home or apartment to retrieve an item that belongs to me, would I be guilty of burglary[?]" After discussing the question with counsel, the court decided to reply "no" to this question. The prosecution then stated that the question "pertains to claim-of-right, Your Honor. And there is no instruction that was given as the claim-of-right here. Because – didn't really apply." The court replied, "The defendant testified that he believed that the Mercedes Benz was actually his car that he's trying to get back. [¶] Defendant also testified that his purpose for entering or attempting to enter Mr. Tomsic's condominium is to get clothes he believes belonged to him because of his previous relationship with some woman. [¶] If the jurors believe the defendant's testimony, would it not be an affirmative defense to the crimes of burglary and attempted burglary if he truly believed that the items were his? [¶] Even if his belief is mistaken as a result of a mental disease or disorder?" The prosecution replied, "yes."

The jury found appellant not guilty of count one, attempted burglary of Tomsic's home. However, the jury found appellant guilty of first degree burglary of Russo's home and guilty of the unlawful driving or taking of Russo's vehicle.

**DISCUSSION**

Appellant contends that the trial court committed reversible error in failing to instruct the jury on the claim-of-right defense. Appellant did not request an instruction on the claim-of-right defense. However, "[i]t is well settled that a defendant has a right to have the trial court, on its own initiative, give a jury instruction on any affirmative defense for which the record contains substantial evidence [citation] . . . ." (*People v.*

*Salas* (2006) 37 Cal.4th 967, 982.)

"A trial court is required to instruct sua sponte on any defense, . . . only when there is substantial evidence supporting the defense, and the defendant is either relying on the defense or the defense is not inconsistent with the defendant's theory of the case. [Citation.]" (*People v. Villanueva* (2008) 169 Cal.App.4th 41, 49.) "'Substantial evidence is evidence sufficient to "deserve consideration by the jury," that is, evidence that a reasonable jury could find persuasive.' [Citation.]" (*People v. Kanawyer* (2003) 113 Cal.App.4th 1233, 1243.) "The threshold is not high; it does not include a predetermination by the court of the credibility of witnesses and what evidence it believes or disbelieves. [Citation.]" (*People v. Cole* (2007) 156 Cal.App.4th 452, 484.)

"The claim-of-right defense provides that a defendant's good faith belief, even if mistakenly held, that he has a right or claim to property he takes from another negates the felonious intent necessary for conviction of theft or robbery." (*People v. Tufunga* (1999) 21 Cal.4th 935, 938.) "'[A] trial court is not required to instruct on a claim-of-right defense unless there is evidence to support an inference that appellant *acted* with a subjective belief he or she had a lawful claim on the property.' [Citation.] Whether or not the evidence provides the necessary support for drawing that particular inference is a question of law. [Citation.] Although a trial court should not measure the substantiality of the evidence by undertaking to weigh the credibility of the witnesses, the court need not give the requested instruction where the supporting evidence is minimal and insubstantial. Doubts as to the sufficiency of the evidence should be resolved in the accused's favor. [Citations.]" (*People v. Barnett* (1998) 17 Cal.4th 1044, 1145, fn. omitted.)

"'"'Whether a claim is advanced in good faith does not depend solely upon whether the claimant believes he was acting lawfully; the circumstances must be indicative of good faith." [Citations.] For example, the circumstances in a particular case might indicate that although defendant may have "believed" he acted lawfully, he was aware of contrary facts which rendered such a belief wholly unreasonable, and hence

in bad faith.' [Citation.]" (*People v. Russell* (2006) 144 Cal.App.4th 1415, 1428 (*Russell*).) Moreover (and determinative here), in order for the defense to apply, "[t]he defendant must take the property 'openly and avowedly . . . .' (Pen. Code, § 511.) If he attempts to conceal the taking, either when it occurs or after it is discovered, the defense is unavailable. [Citations.]" (*People v. Wooten* (1996) 44 Cal.App.4th 1834, 1849.)

Here, appellant did not commit the burglary and unlawful taking of Russo's car "openly and avowedly." To the contrary, the evidence is undisputed that he surreptitiously entered Russo's apartment at 3:30 a.m., by removing a screen and crawling through a window, and took the key to her car. He consciously avoided awaking Russo (not knowing that she was already awake) and tried to conceal his presence and the taking of the key. Using the key, he then drove off in her car, apparently not aware of, or ignoring, her yelling at him. Clearly, the time and method of his entry into the apartment, the taking of the key, and driving off in the car, cannot be described as open and avowed. Thus, the claim-of-right defense was unavailable as a matter of law.

The circumstances here are unlike those in *Russell*, in which the defendant found a broken down motorcycle near the trash outside a motorcycle shop, asked a salesperson if it belonged to the shop and, when stopped by an officer for a traffic violation, told the officer he had found it abandoned, punched the ignition to start it, and repaired it. In addition, during this traffic stop, the officer checked the vehicle identification number and told the defendant the motorcycle had not been reported stolen. On appeal, the court held that the trial court erred in failing to instruct the jury sua sponte on the claim-of-right defense, reasoning that the defendant "did not behave in a furtive manner or attempt to conceal the fact that he had taken the motorcycle or punched its ignition." (*Russell*, *supra*, 144 Cal.App.4th at p. 1431.)

Unlike in *Russell*, appellant behaved in a furtive manner in entering Russo's apartment and taking her car, inconsistent with a claim-of-right defense. The trial court did not err in failing to instruct sua sponte on that theory.

## DISPOSITION

The judgment is affirmed.

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WILLHITE, Acting P.J.

We concur:

MANELLA, J.

SUZUKAWA, J.